In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 133

RUBY KOLOD, WILLIE ISRAEL ALDERMAN AND FELIX ANTONIO ALDERISIO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON MOTION TO MODIFY THE ORDER OF THE COURT

REPLY MEMORANDUM FOR THE UNITED STATES

Petitioners' memorandum in opposition to the government's motion to modify the order of the court is premised on a misunderstanding of the nature of the question before the Court. Thus, petitioners contend that an adversary procedure is required so that the defendant may "follow the primary illegality through the government's filing system to see where it went and what use was made of it at each place it rested and in each form that it took." (Memorandum in Opposition to Motion to Modify the Order of the Court, p. 7). Implicit in this argument is the assumption that information relevant to the prosecution had been obtained by the electronic surveillance.

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However, the government's basic contention in this case is that an examination of all the logs reflecting overheard conversations[1] will show that none of the overheard conversations involved anything arguably relevant to the prosecution. It is obvious that the extent of the intragovernmental distribution of overheard conversations is of no import when it appears that what was overheard could not possibly relate to the offense for which the defendant was convicted.

The government does not contend that the contents of overheard conversations should never be disclosed to the defense. Indeed, we have followed the policy of making a disclosure of overheard conversations to the court and the defense any time anything arguably relevant to the prosecution has been overheard. However, there are a great many situations in which a district judge can readily determine that what has been overheard is utterly irrelevant to the case before him. For example, where the defendants have been overheard gossiping about improper activities of third parties totally unrelated to the case at bar or merely conversing about social engagements, the irrelevancy of the material would be self-evident.[2] It is only in

[1] In requesting a remand for an *in camera* examination of all logs reflecting conversations involving petitioners, the government does not mean to suggest that it intends to make a selective rather than a full disclosure. On the contrary, the government's disclosure to the district court will be of all logs and memoranda which reflect any illegal electronic surveillance of a defendant's premises or conversations.

[2] This would be particularly true where the overheard conversations occurred a substantial period of time prior to the events which formed the basis of the indictment.

such situations, *i.e.*, where it is self-evident that the overheard conversations bear no relationship to the prosecution, that we suggest that considerations of national security and potential injury to third parties support the view that the judge should examine the materials *in camera*.

Of course, there will be instances where the trial judge will not be able to determine from the face of a particular conversation whether or not that conversation was in any way related to the offense in question. However, under the procedure that we suggest the judge will have the power to order any further proceedings which he considers to be necessary in order to establish that the prosecution is not founded on illegally obtained evidence. The discretion to make such a determination has traditionally been lodged in the district judges. See *Nardone* v. *United States*, 308 U.S. 338, 342. There will, no doubt, be cases in which the district judge will determine that an evidentiary hearing is necessary. Our point here is that there will be a great many situations where it is clear that the overheard conversations have no conceivable relevance to the prosecution and that disclosure of such conversations could seriously injure national security or third parties. In such situations, there appears to be no reason to compel disclosure to anyone other than the judge.

Petitioners argue that a protective order under Rule 16(e) F.R.Crim.P. will protect the governmental interest in security and avoid harm to third persons, stating that they are not aware of any

instance in which a defendant or his counsel has been shown to have violated a protective order. But the more people who are shown the material, the greater the danger of exposure, unwitting or purposeful. The fact is that protective orders have not been uniformly successful. In *United States* v. *Black*, on remand to the district court from this Court's decision in 384 U.S. 983, materials relating to overheard conversations were turned over to the defense on December 15, 1967. Thereafter, beginning on December 26, 1967, a series of newspaper articles appeared which quoted extensively from these logs. Many of the conversations reported in these articles involved third parties and not the defendant. See the Washington Post, December 26, 1967, p. B 11; *id.* December 28, 1967, p. E 7; *id.* December 30, 1967, p. C 11; *id.* January 5, 1968, p. B 7; *id.* January 12, 1968, p. B 11. See also *Baker* v. *United States*, where information turned over by the government under protective orders was subsequently disclosed in various newspapers throughout the United States.[4]

[4] The petitioners claim that the government has improperly "leaked" material in previous logs and in support thereof have filed a sealed exhibit. However, it is clear that petitioners claim no personal knowledge to support this allegation, and in fact neither the Attorney General nor the Solicitor General has any information which lends any support to petitioners' allegations that the government has dealt improperly with this material.

Our reference to the *Black* and *Baker* cases is not designed to assess the blame for the publicity which occurred in these instances. Any investigation of the matter of compliance with the protective orders there issued falls within the province of the district judge concerned.

We recognize that where the overheard conversations are arguably relevant to the prosecution of the defendant, the defendant's right to investigate the use to which this information was put clearly requires that the defense be given access to this material. However, in the many instances where the overhearing is clearly unrelated to the case at issue, there is no need to increase the risks of public disclosure of material harmful to third parties or the national security. A federal trial judge should be able to foreclose further disclosure when he finds that there is not even a tenuous connection between the overheard conversation and the prosecution.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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